

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of E.L. and the)
Metropolitan School District of) **Article 7 Hearing No. 927-96**
Martinsville)

The hearing and appeal issues were determined to be:

1. Was the Individualized Education Program (IEP), which was in place at the beginning of the 1996-1997 school year, followed up until the Case Conference Committee meeting on November 15, 1996?

2. Is the current interim Individualized Education Program (IEP) dated November 15, 1996, appropriate?

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the parent or parents of the student.

<i>October 10, 1996</i>	Petitioners, through their attorney, John Emry, Esq., filed a request for a due process hearing with the Indiana Department of Education (IDOE).
<i>October 17, 1996</i>	Case Conference Committee Meeting, and Individualized Education Program developed.
<i>October 18, 1996</i>	Julie T. Steck, Ph.D., was appointed Independent Hearing Officer (IHO) under 511 IAC 7-15-5.
<i>October 29, 1996</i>	In a letter dated October 29, 1996, M.S.D. of Martinsville (the School) requested a thirty (30) day extension to secure representation and prepare

for the case.

October 31, 1996 In a memorandum dated October 31, 1996, the IHO granted a thirty (30) day extension.

November 15, 1996 Case Conference Committee Meeting, and interim Individualized Education Program developed.

Mr. Alan Kosinski, Director of Special Education for the School (the Director), and Mr. John Emry, counsel for the Student, jointly requested an extension of time from the IHO until after January 14, 1997. At that time there would be another Case Conference Committee meeting to determine whether the current IEP was appropriate. The IHO granted an extension until February 14, 1997.

January 17, 1997 A prehearing conference was conducted by telephone. The following issues were established:

1. Was the Individualized Education Program (IEP), which was in place at the beginning of the 1996-1997 school year, followed up until the Case Conference Committee meeting on November 15, 1996?
2. Was the current interim Individualized Education Program (IEP) dated November 15, 1996, appropriate?

The School requested the authority to perform additional testing of the Student's abilities and achievement prior to the hearing.

February 14, 1997 was established as the date for the exchange of witness and exhibit lists. A hearing was scheduled for February 24, 1997.

January 20, 1997 In a memorandum dated January 20, 1997, the IHO ordered that the School be able to conduct further testing, which would be supplemental to the previous evaluation conducted at the University of Minnesota on

September 20, 1996. The evaluation was to be done in a fashion similar to those conducted on other students. A copy of the evaluation results was to be forwarded to the parent and to the IHO.

January 23, 1997 In a letter dated January 23, 1997, the School's Director informed the mother of the Student that the Student would be evaluated by one of the School's staff psychologists within the next two weeks. The IHO gave permission for the School to complete the educational evaluation as requested at the pre-hearing conference on January 17, 1997. The evaluation would be similar to an evaluation given to any other health-impaired student.

February 24, 1997 A prehearing conference was held prior to the start of the scheduled hearing. The IHO and representatives for both parties waited until 30 minutes past the time scheduled for the hearing because the Petitioner (parent of the student) had not arrived at the hearing by that time and could not be contacted. The representative for the School moved that the Petitioner be held in default and that the hearing be dismissed under I.C. 4-21.5-3-24. The motion was denied, and the hearing was continued to March 21, 1997. A written decision was to be rendered by April 4, 1997. A telephone prehearing conference was scheduled for March 5, 1997, to ensure that all parties were aware of the date and time of the hearing.

March 5, 1997 A prehearing conference was conducted by telephone to confirm that the hearing was scheduled for March 21, 1997.

March 21, 1997 A prehearing conference was held prior to the start of the hearing.

March 21, 1997 The due process hearing was conducted.

April 4, 1997 The IHO issued her written decision.

The due process hearing was conducted over one day -- March 21, 1997. The hearing was closed to the public, and witnesses were separated from one another during the hearing. The IHO's decision found that the student had moved from another state and had entered the local

elementary school in February 1996, while in grade three. The IHO noted that the student was a 10-year-old male in grade four. The student was diagnosed with adrenoleukodystrophy (ALD). ALD is a genetic degenerative disease of the white matter of the central nervous system. ALD impairs the student's ability to learn, to listen, and to retain what is learned. The student received a bone marrow transplant for the disease in approximately 1991. Since the transplant, the student had not regressed in his mental abilities.

Neuropsychological testing was conducted one year after the transplant, and showed that the student's overall abilities to be within the borderline-to-low average range. The neuropsychological testing showed that the student's level of intellectual functioning was within the broad range of average, but the student had trouble acquiring new information, had trouble maintaining his attention span, and had visual processing deficits. Results of neuropsychological evaluations conducted on an annual basis have shown stability in the student's IQ. The student's ability falls within the low average range. The results of academic achievement testing from September 1996 and January 1997 indicated that reading achievement was consistent with the student's ability level. Achievement in mathematics was below the student's ability level.

The student began receiving special education services in Minnesota in November 1992, as a student with a physical and other health impairment. The student's initial Case Conference Committee (CCC) meeting after moving to Indiana was held on February 9, 1996. The Case Conference Review Report stated that the committee's "recommendation is to continue with status quo -- accept IEP (Minnesota dated)." Under frequency and intensity, the report indicated "up to 2 hours/day -- 5 days/week (Minn.) IEP dated 11-28-95." The IEP from Minnesota indicated that the student would receive 550 minutes direct other health impaired (OHI) services and 20 minutes indirect OHI services.

The student received 435 minutes per week from the learning disabilities resource teacher from February 9, 1996 until the end of the 1995-1996 school year. No concerns were raised by the

parent during that time. Early in the 1996-1997 school year, concerns were raised by the parent due to the student's difficulty in complying with the homework policy of the general education fourth grade teacher. The School made adaptations to the homework policy in response to the parent's concern.

After filing for an Article 7 Hearing, the parent became aware that the student was not receiving 550 minutes per week of resource assistance as indicated in the IEP from Minnesota. At the October 17, 1997 CCC meeting, an Annual Case Review (ACR) was held. The goals and objectives written at the ACR indicated that direct instruction from the resource teacher would be delivered for mathematics. Language arts assistance would be included in the general education classroom. The option of the student transferring to an in-town school in order to receive 550 minutes of learning disabilities resource assistance a week was rejected by the parent. The student would receive 360 minutes a week of learning disabilities resources consisting of instruction in the resource room and in the general education classroom. Referral for a speech and language evaluation was initiated.

On November 15, 1996, the CCC met to review the student's progress and the results of the speech and language evaluation. The speech and language evaluation indicated that the student was eligible for speech and language therapy two times a week for 20 minutes each session. A plan for homebound placement was made in the event that the student would become ill. The parent did not agree with the recommended plan. The School had a nursing care plan to address the student's health impairment and medical needs.

The student had made academic gains in language arts and met his educational goals in his educational program from February 1996 to January 1997. The student began experiencing increased difficulty in mathematics in grade four, and his instruction was transferred to the resource room. The student also enjoyed school and was considered emotionally well-adjusted.

The IHO made two Conclusions of Law. These read as follows:

Conclusions of Law

1. Direct testimony and other evidence does establish that the LEA did not provide services of the frequency and intensity specified in the student's IEP accepted from Minnesota. However, the student did receive consistent learning disabilities resource instruction that met the criteria "up to 2 hours/day -- 5 days/week" and achieved the goals and objectives specified in the student's IEP.

Achievement of these goals was documented by formal and informal test results. The IEP in place at the beginning of the 1996-1997 school year was followed in intent and provided an appropriate public education in accordance with 511 IAC 7-12-1(k).

2. Direct testimony and other evidence does establish that the student's interim Individualized Education Program developed October 17, 1996, and November 15, 1996, is appropriate as specified in 511 IAC 7-12-1(k) and 511 IAC 7-12-2.

The IHO's Order read as follows:

Based on the aforementioned FINDINGS OF FACT and CONCLUSIONS OF LAW, the student shall continue receiving services under the Individualized Education Program developed at Case Conference Committee meetings on October 17, 1996, and November 15, 1996.

PROCEDURAL HISTORY OF THE APPEAL

The IHO's written decision was issued on April 4, 1997. The Student's Petition for Review was received on May 6, 1997. On May 16, 1997, the School requested an enlargement of time in order to prepare a response. The Indiana Board of Special Education Appeals (BSEA), by order dated May 19, 1997, granted the School an extension of time to file its Response to the Petition for Review until close of business on June 18, 1997.

On June 17, 1997, the School filed a Motion to Dismiss or in the Alternative Response to Petition, with a Brief in Support of Motion to Dismiss or in the Alternative Response to Petition. The BSEA notified the parties by order dated June 19, 1997, that the Student's counsel had until

the close of business, Friday, June 27, 1997, to respond to the Motion to Dismiss. All other time frames were extended. Upon filing of the Response to the Motion to Dismiss, the record must be reviewed and a written decision issued not later than August 4, 1997.

The BSEA notified the parties by order dated June 27, 1997, that it would conduct its review on July 28, 1997, beginning at 10:00 a.m., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). The BSEA also notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript is to be sent to the representatives of the parties when available.

On June 27, 1997 the Petitioners filed a Response to the School's Motion to Dismiss. By order dated July 2, 1997, the BSEA denied the School's Motion to Dismiss.

Student's Petition for Review

The Student's Petition for Review was timely filed on May 6, 1997. The Student appealed for the following reasons:

1. The IHO correctly concluded that the School did not provide services of the frequency and intensity specified in E.L.'s IEP accepted from Minnesota. However, the IHO's finding that the phrase "2 hours/day - - 5 days/week" allowed the School to provide what was admitted to as far less than called for by the Minnesota IEP was arbitrary, an abuse of discretion, contrary to state and federal law, and unsupported by substantial evidence.
2. The IHO's conclusion that the interim IEP developed on October 17, 1996 and November 15, 1996, was appropriate was arbitrary, an abuse of discretion, contrary to state and federal law, and unsupported by substantial evidence.
3. The finding that the Student "should continue to receive the same services as before was erroneous and contrary to his best interests."

The relief sought includes:

1. A full "reimplementation" of E.L.'s IEP.

2. The “education of those involved” as to the reasons for and requirements of the IEP and the nature of E.L.’s disability.
3. Money damages for any injury occasioned by the changes in the IEP and the failure to provide notice of the changes in the IEP.
4. Attorney fees, expenses and costs reasonably incurred in pursuit of E.L.’s remedies.
5. Any other relief appropriate under the circumstances.

IHO’s Findings of Fact

The Student did not object to any of the Findings of Fact.

IHO’s Conclusions of Law

As noted above the Student objects to the IHO’s finding in Conclusion of Law #1 that the phrase “2 hours/day - - 5 days/week” allowed the School to provide what was admitted to as far less than called for by the Minnesota IEP. The Student argues that such a finding was arbitrary, an abuse of discretion, contrary to state and federal law, and unsupported by substantial evidence.

The Student also objects to the IHO’s Conclusion of Law #2 that the interim IEP developed on October 17, 1996 and November 15, 1996 was appropriate. The Student argues that such a conclusion was arbitrary, an abuse of discretion, contrary to state and federal law, and unsupported by substantial evidence.

The Student also objects to the IHO’s determination that he should continue to receive the same services as before. This, he believes, was erroneous and contrary to his best interests.

School’s Response to the Petition for Review

The School timely filed its Response to the Petition for Review. In summary, the School argues:

1. Because the Petitioners have not challenged any of the Findings of Fact in the IHO’s

decision, these are to be taken as true and presented here as undisputed.

2. The Petition for Review fails to be specific as to the reasons for the objections to the IHO's decision by failing to identify those portions of the findings, conclusions, and order to which exceptions are taken. The Petition merely recites the IHO's two conclusions and then recites four of the six grounds upon which the BSEA is permitted to overturn a IHO's decision under 511 IAC 7-15-6(k). Thus, the Petition fails to comply with 511 IAC 7-15-6(e).
3. The Petition for Review fails to sustain Petitioner's burden of proof of demonstrating why the IHO's decision was erroneous. 511 IAC 7-15-6(h) provides that "any petition for review that does not comply with the requirements of subsection (e) may be dismissed, in whole or in part, at the discretion of the state board of special education appeals."
4. Petitioners do not challenge the IHO's findings, but assert the IHO's two conclusions are arbitrary. Because the findings are unchallenged by the Petitioners, they are binding on the BSEA. The Petitioners only challenge the conclusions to be drawn from the findings. The Petitioners disagree with the IHO's conclusion, but since they do not challenge the IHO's findings, they cannot as a matter of law meet their burden of showing that her decision is arbitrary.
5. Petitioners' objection to the IHO's two conclusions is that they are an abuse of discretion, and yet Petitioners fail to meet their burden of showing how the IHO's decision is an abuse of discretion. Because the IHO's decision is completely within the scope of the findings and consistent with the findings and evidence in the record, there is no abuse of discretion.
6. The Petition for Review alleges that the IHO's conclusions are contrary to state and federal law, and yet fails to indicate which state and federal laws may have been violated. Without an indication as to what laws were violated, the Respondent is precluded from responding to this allegation, and the Petitioners have failed to meet their burden of proof to show that the IHO erred.
7. The Petition for Review alleges that the IHO's conclusions were unsupported by

substantial evidence. The findings have not been challenged by the Petitioners, and are fully supported by the evidence. Because Petitioners have failed to challenge the findings, they cannot meet their burden of proving that the IHO's decision was unsupported by substantial evidence.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The BSEA convened on Monday, July 28, 1997, to review the Petition for Review and the Response thereto in consideration of the record as a whole.¹ The review was tape recorded. A transcript will be made from the tape and provided to the parties by the IDOE.

Discussion

In the opinion of the BSEA, considerably less confusion would have resulted if: 1) the interim IEP was clearly designated as diagnostic in nature; and 2) the School could have been much clearer with the parent in terms of the nature of this IEP and how it may differ from the Minnesota IEP in meeting the goals and objectives for an appropriate public education.

In consideration of the record, the Petition for Review, and the Response thereto, the BSEA now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The BSEA accepts the IHO's first conclusion of law, and finds this conclusion of law is not arbitrary, is not an abuse of discretion, is not contrary to state and federal law, and is supported by substantial evidence.
3. The BSEA denies the Student's allegations regarding the IHO's second conclusion of law, and finds that this conclusion of law is not arbitrary, is not an abuse of discretion, is not contrary to state and federal law, and is supported by substantial evidence.
4. The BSEA accepts the IHO's Order as written, and adds a caption "ORDER" prior to the last paragraph on page 4 of the IHO's decision.

¹ BSEA member Cynthia Dewes did not participate in this review.

5. There should be full implementation of the current Indiana IEP by continuing that IEP as consistent with the IHO's order.
6. The decision of the IHO is upheld in all respects except the BSEA adds the following to the IHO's first Conclusions of Law on page 4: the word "Indiana" to line 4 in paragraph 1 after the word "student's" and before the acronym "IEP."
7. The School personnel who are working with the Student have already been trained in the emergency procedures, the administration of the medication, and the nature of the Student's disability, so the Student's request regarding the "education of those involved" is denied..
8. The Student's request for money damages is denied.²
9. The Student's request for attorney fees, expenses and costs is denied.³
- 10 . The Student's request for any other relief appropriate under the circumstances is denied.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The decision of the IHO is upheld in all respects except the BSEA adds the following to the IHO's first Conclusions of Law on page 4: the word "Indiana" to line 4 in paragraph 1 after the word " student's" and before the acronym "IEP." This first Conclusion of Law now reads as follows:

1. Direct testimony and other evidence does establish that the LEA did not provide services of the frequency and intensity specified in the student's IEP accepted from Minnesota. However, the student did receive consistent learning disabilities resource instruction that met the criteria "up to 2 hours/day -- 5 days/week" and achieved

² Money damages are not available under the Individuals with Disabilities Education Act (IDEA), as implemented in Indiana through the rules and regulations of the Indiana State Board of Education.

³ Pursuant to 511 IAC 7-15-6, a parent may proceed to civil court for the resolution of this issue. The BSEA is not empowered to award fees or costs.

the goals and objectives specified in the student's Indiana IEP. Achievement of these goals was documented by formal and informal test results. The IEP in place at the beginning of the 1996-1997 school year was followed in intent and provided an appropriate public education in accordance with 511 IAC 7-12-1(k).

2. The BSEA accepts the IHO's Order as written, and adds a caption "ORDER" prior to the last paragraph on page 4 of the IHO's decision. This Order now reads as follows:

ORDER

Based on the aforementioned FINDINGS OF FACT and CONCLUSIONS OF LAW, the student shall continue receiving services under the Individualized Education Program developed at Case Conference Committee meetings on October 17, 1996, and November 15, 1996.

3. Any other matters not specifically addressed by the BSEA in this written decision are hereby deemed denied or dismissed.

Date: August , 1997 _____

/s/Raymond W. Quist _____
Raymond W Quist, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).

